WINERICH SDN BHD

v.

ALPHA ATLAS MANAGEMENT SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[COMPANIES WINDING-UP NO: MT1-28-48-2002]
7 AUGUST 2003

CIVIL PROCEDURE: *Affidavit - Affidavit verifying petition - Extension of time, application for - Companies (Winding-up) Rules 1972, r. 26 - Breach of - Whether rendered petition void - Power and discretion of court - Companies (Winding-up) Rules 1972, rr. 193 & 194 - Companies Act 1965, s. 221(2)*

COMPANY LAW: *Winding-up - Petition - Affidavit verifying petition - Companies (Winding-up) Rules 1972, r. 26 - Breach of - Whether petition void - Application for extension of time to file affidavit - Power and discretion of court - Companies (Winding-up) Rules 1972, r. 193*

This was an application filed by the petitioner for an order to extend the time to file the affidavit verifying the petition filed on 24 December 2002, and to allow the petitioner to file the said affidavit within four days of this order with costs in the cause. The said affidavit was affirmed on 18 December 2002 which was four days prior to the filing of the petition. The respondent contended that the petitioner had not complied with r. 26 of the Companies (Winding-up) Rules 1972 ('the Rules').

Held:

[1] The court followed the principles enunciated in the cases of *Sam Hin Timber Trading Company v. Perusahaan Sri Duyong Sdn Bhd, Sari Atlantic Sdn Bhd v. Aik Kim Enterprise* and *The People's Insurance Company (M) Sdn Bhd v. Juru Urusetia Sdn Bhd* where it was held that non-compliance with r. 26 did not render the petition a nullity and was curable by the court The court had the power to extend the time asked for under rr. 193 and 194 of the Rules and that premature swearing or affirming of such an affidavit is a mere irregularity curable by granting an extension of time. Further ss. 221(2)(b) and (f) of the Companies Act 1965 also allowed the court to cure a technical error which did no injustice to the respondent, as in this case. (pp 262 g-h & 263 c)

[Petitioner's application allowed.]

Case(s) referred to:
Chin Yoon Timber Co v. Overseas Lumber Bhd [1978] 2 MLJ 173 ***(refd)***
Sam Hin Timber Trading Company v. Perusahaan Sri Duyong Sdn Bhd [1983] 2 CLJ 269; [1983] CLJ (Rep) 838 HC ***(foll)***
Sari Atlantic Sdn Bhd v. Aik Kim Enterprise [1988] 1 MLJ 201 ***(foll)***
Sobri Arshad v. Associated Tractors Sdn Bhd [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756 HC ***(refd)***
The People's Insurance Company (M) Sdn Bhd v. Juru Urusetia Sdn Bhd [1997] 3 CLJ Supp 388 HC ***(foll)***
YPJE Consultancy Services Sdn Bhd v. Heller Factoring (M) Sdn Bhd [1996] 3 CLJ 51 CA ***(refd)***

Legislation referred to:
Companies Act 1965, s. 221(2)(b), (f)
Companies (Winding-up) Rules 1972, rr. 26, 193, 194(1)

For the petitioner - Kesavan P Krishnan; M/s Kesavan & Assoc
For the respondent - Jagjit Singh; M/s Rastam Singa & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application

This is an application in encl. (16) by way of summons-in-chambers filed by the petitioner for an order to extend the time to file the affidavit verifying the petition filed on 24 December 2002, and to allow the petitioner to file the said affidavit within four days of this order with costs in the cause. The said affidavit was affirmed on 18 December 2002 which was four days prior to the filing of the petition.

Both the petition and the said affidavit have been served on the respondent.

All references herein to the sections and the rules are references to those sections in the Companies Act 1965 and the Companies (Winding-up) Rules 1972.

Counsel's Submissions And Court's Decision

En. Kesavan P. Krishnan, learned counsel for the petitioner, submitted that r. 26 is merely directory and not mandatory and must be read with rr. 193 and 194. It was also canvassed that the respondent was not misled or prejudiced hereby.

En. Jagjit Singh, learned counsel for the respondent, contended that the petitioner has failed to provide good and cogent reasons for the court to exercise its discretion to grant the extension, and that since r. 26 has not been complied with, the petition is void, relying on *YPJE Consultancy Services Sdn Bhd v. Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 3 CLJ 51.

In my judgment, it is pertinent to observe that the above submissions show a common ground, that is, the said affidavit has failed to comply with r. 26, the relevant position of which reads as follows:

> Every petition for the winding-up of a company by the Court shall be verified by an affidavit verifying thereto. The Affidavit in Form 7 shall be made by the petitioner ..., and shall be sworn and filed within four days after the petition is presented, ...

The question is whether non-compliance with r. 26 renders the petition void as contended for the respondent. In my view, this question is to be determined by a true construction of rr. 26, 193, 194(1) and s. 221(2).

For the sake of completeness, rr. 193 and 194(1) merit reproduction as follows:

> 193. The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.
>
> 194.(1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

While r. 26 no doubt provides for a time-limit for the affirmation of an affidavit in Form 7 verifying a petition ie, four days after the petition is presented, such a time-limit is to be read in the context of r. 193 under which the court is given the power or discretion in any cause in which it shall see fit to extend or abridge the time appointed by these Rules.

The strictness of r. 26 is further mitigated by r. 194(1) which disallows proceedings under the Companies Act 1965 or the Companies (Winding-up) Rules 1972 to be invalidated by any formal defect or irregularity unless there is substantial injustice caused thereby which cannot be remedied by any order of the court.

Further s. 221(2)(b) and (f) where relevant contain sufficiently broad provisions in the following words:

> 221. (2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition:
>
> (a) ...;
>
> (b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the Court;
>
> (c) ...;
>
> (d) ...;
>
> (e) ...;
>
> (f) give such directions as to the proceedings as the Court thinks fit.

These broad provisions include the exercise of the powers of the court when the petition comes on for hearing or in any application made by the petitioner at any stage of the proceedings, untrammelled by any limit but as the court thinks fit, including curing irregularities without causing any injustice to the respondent.

The power or discretion is to be exercised judicially according to the particular facts and circumstances prevailing in each individual case.

An analysis of several decisions of our court dealing with similar applications arising from similar facts and circumstances would undoubtedly be illuminating.

In *Sam Hin Timber Trading Company v. Perusahaan Sri Duyong Sdn. Bhd.* [1983] 2 CLJ 269; [1983] CLJ (Rep) 838 HC, a petition for the winding-up of Sri Duyong was presented on 24 March 1983, but the affidavit verifying the petition was affirmed on 8 March 1983, some 16 days prior thereto, occasioning a non-compliance with r. 26. An application filed by the petitioner for extension of time for filing such affidavit ie, to reaffirm the same affidavit, was opposed by Sri Duyong. Peh Swee Chin J (later FCJ) held that the court has the power to extend the time asked for under rr. 193 and 194 and that the premature swearing or affirming of such an affidavit is a mere irregularity curable by granting an extension of time and

compensating the victim with costs, because Sri Duyong could not have been misled in any way, neither was there any real prejudice caused to Sri Duyong.

A petition was presented to the court to wind-up the respondent company in *Sari Atlantic Sdn. Bhd. v. Aik Kim Enterprise* [1988] 1 MLJ 201, but the affidavit verifying the petition was affirmed about four days before the presentation of the petition itself, which was a clear failure to comply with r. 26. At the hearing of the petition, the respondent company contended that the non-compliance was a fatal defect and that the petition must be rejected as the court had no power to cure such a defect. Lim Beng Choon J (as he then was) held that the non-compliance did not render the petition a nullity and was curable by the court and that s. 221(2)(b) and (f) allowed the court to cure a technical error which did no injustice to the respondent. The learned judge allowed an extension of time to the petitioner to reswear an affidavit to verify the facts and the filing and swearing of such affidavit before the hearing of the petition.

In *The People's Insurance Company (M) Sdn Bhd v. Juru Urusetia Sdn Bhd* [1997] 3 CLJ Supp 388, the petitioner presented a winding-up petition on 22 October 1996. On that same day, it filed the affidavit which was sworn on 18 October 1996 ie, before the presentation of the petition, in breach of r. 26. On 3 January 1997, the respondent informed the petitioner of this breach. On 17 January 1997, the petitioner filed an application for extension of time to file a verifying affidavit. Abdul Aziz Mohamad J (later JCA) held that the affidavit which did not comply with r. 26 was at worst a nullity, but the petition itself was not void, and that a petition may be presented without a verifying affidavit and it can remain without one for four days, but becomes defective if the verifying affidavit was not filed in time ie, within four days of the presentation of the petition. The learned judge also held that the power to extend time is given by r. 193 and granted leave to the petitioner to file a freshly-sworn affidavit, with costs in the cause.

It is instructive to observe that the facts before all the three learned judges bore striking similarities in relation to those in this application before me.

At this juncture, it is useful to observe a point of practical convenience, in that the petition and the said affidavit are almost always prepared simultaneously and that the said affidavit is invariably affirmed before these two documents are filed, also simultaneously as a result of which the said affidavit would bear a date prior to the date of the petition which is

subsequently entered by the registry staff and eventually signed and sealed by the registrar, sometimes a few days later in view of the volume of work handled by the registry. Hence, the Act and the rules contain a provision for the extension of time in order to avoid any miscarriage of justice.

It is essential that the court is empowered to grant an extension of time to remove any exceptional hardship to legal practitioners. The submission advanced for the respondent, if upheld, would result in untold difficulties to members of the Bar.

I pause here to refer to *Chin Yoon Timber Co v. Overseas Lumber Bhd* [1978] 2 MLJ 173 which was referred to by all the aforesaid three learned judges who declined to follow it. In *Chin Yoon Timber*, the court refused an extension of time because, *inter alia*, the learned judge there appeared to have taken a dim view of the petitioner filing a second affidavit without applying for leave before hand, during an adjournment expressly granted to enable parties to look up authorities to deal with the objection of premature swearing of a similar affidavit, and making an oral application in the middle of re-arguments, for extension of time in order to validate apparently the second affidavit, without any explanation. What the petitioners had done there in filing a second affidavit in advance of re-arguments and the court's judgment would appear to be an act of considerable discourtesy to his Lordship there, and an oral application not therefore supported by an affidavit setting out the reasons for the application, would not be appropriate in the circumstances of that case: see para 7 of the judgment of Peh Swee Chin J (later FCJ) in *Sam Hin Timber, supra,* at p. 270 (p. 840).

YPJE Consultancy Services, supra relied upon by the respondent herein, does not seem to be supportive of the contention for the respondent. The Court of Appeal in *YPJE Consultancy Services* at p. 61 after referring to *Chin Yoon Timber, supra,* and *Sobri bin Arshad v. Associated Tractors Sdn. Bhd.* [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756, observed:

> What is clear from these authorities is that the affidavit must be made in some cause or matter which is actually pending in the court. Consequently, the affidavit which was sworn before the presentation of the petition would cause the petition to be void ...

The Court of Appeal's observation was referred to by Abdul Aziz Mohamad J (now JCA) in *The People's Insurance, supra,* who at p. 390 f-g said:

> ... It does not seem to me that the Court of Appeal were there making a considered ruling that where an affidavit verifying a winding-up petition is sworn before the presentation of the petition, the petition is void. I think it was a statement of what they perceived to be the consequence of the defect as decided in the two cases that they were referring to. They had no need to arrive at a decision on that issue because they went on to find in the case before them that there was no evidence that the affidavit had been sworn before the petition was presented and therefore the two cases cited were not applicable to the factual situation before them.

I am in entire agreement with the aforesaid statement, and follow the principles enunciated above by Peh Swee Chin J, (later FCJ); Lim Beng Choon J and Abdul Aziz Mohamad J (now JCA).

In the circumstances, I allow the petitioner's application in encl. (16) and make an order in terms thereof.